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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH BERGHMAN AND JOETTA BERGHMAN

VERSUS

ATLANTIC RICHFIELD COMPANY, McDERMOTT, INC., and HOUMA INDUSTRIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Whether this Court should grant a petition for writ of certiorari on an issue of law well-established and accepted in all jurisdictions of the United States?

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SUMMARY OF THE ARGUMENT

The Fifth Circuit ruling in this case was a routine affirmation of a Federal district court's decision on an accepted principle of law. Petitioners have presented no reason why this court should grant their petition for writ of certiorari. Both the Fifth and Third Circuits have decided that the "borrowed servant" doctrine survived the 1984 amendments to the LHWCA. There is no conflict among the circuits. The matter is settled federal law. This court should deny the petition for writ of certiorari.

ARGUMENT IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

Joseph and Joetta Berghman have petitioned this court to issue a Writ of Certiorari to review a decision of the United States Fifth Circuit Court of Appeals. Specifically, petitioners ask this court to abolish the "borrowed servant" doctrine which has existed in state and federal courts for decades. Forgetting for the moment that the Fifth Circuit has correctly addressed the "borrowed servant" issue, the petitioners give no indication why this decision is worthy of review.

A review on writ of certiorari is not a matter of right, but of judicial discretion. The Rules of the Supreme Court make it clear that a writ of certiorari will be granted only in specific situations. Petitioners have presented no reason why this court should issue a writ of certiorari. The decision by the Fifth Circuit does not conflict with a decision of another United States Court of Appeals, nor a state court of last resort. The court simply affirmed a district court decision which upheld a doctrine which has been in existence in the United States for years, and has long been the law of the Fourth and Fifth Circuits. **West v. Kerr-McGee Corp.**, 765 F.2d 526 (5th Cir. 1985); **Huff v. Marine Testing Corp.**, 631 F.2d 1140 (4th Cir. 1980).

Although not clear, it appears that petitioners pin their hopes of review on Rule 1(a)(iii). Their claim seems to be that the Fifth Circuit has decided an important question under the Longshore and Harbor Workers' Compensation Act (hereinafter referred to as "LHWCA") which has not been settled by the Supreme Court. For the reasons set forth in the following paragraphs, petitioners are wrong.

The Fifth Circuit correctly determined that the "borrowed servant" doctrine survived the 1984 amendments to the LHWCA in **West v. Kerr-McGee Corp.**, 765 F.2d 526 (5th Cir.

1985). Specifically, the court held that the 1984 amendments did not preclude use of the borrowed employer doctrine under LHWCA. Other commentators feel so as well. **See**, 1(a) E. Jhirad, Benedict on Admiralty, Sect. 34 2-142, 146 (1989) (suggesting that the borrowed servant doctrine is still viable under LHWCA). Subsequently, in **Doucet v. Gulf Oil Corporation**, 783 F.2d 518 (5th Cir. 1986), the Fifth Circuit again determined that the "borrowed servant" doctrine survived the 1984 amendments. In reaching that decision, the court stated:

> This circuit has consistently held that, if an oil company assumes so much control over the activities of a person who is nominally the employee of the company's subcontractor as to make that person in effect its borrowed employee, the company is shielded by the exclusivity of the compensation remedy from tort liability. [citations omitted.] This was not based on a specific provision of the Compensation act but stemmed from a reverse application of the respondeat superior rule, the rule that an employer is responsible not only for the act of those persons on his payroll but for the acts of those over whom he has such control that they are in effect his borrowed servants. [citation omitted.]

Doucet, 783 F.2d at 522.

Not only has the Fifth Circuit determined that the 1984 amendments to Section 905(a) did not preclude the use of the borrowed employer doctrine, the Third Circuit recently reached the same conclusion. **Peter v. Hess Oil Virgin Islands Corp.**, 903 F.2d 935 (3rd Cir. 1990). In **Peter**, the court acknowledged that the language of the amendment provides an argument that

the borrowed servant doctrine is no longer viable under LHWCA. However, it rejected this argument, and agreed with the Fifth Circuit, as it stated:

> The borrowed servant test provides a way to answer the question that accords with the reality of the claimant's employment circumstances; a way that we believe the Congress would not have eliminated without indicating what should take its place. When this test indicates that an entity other than the one that putatively employs the claimant is really the claimant's employer, that borrowing employer has been found to be the claimant's employer under the Act and has been held to be both subject to the burdens and entitled to the benefits that come with such status. We find that this continues to be the appropriate approach under LHWCA. [Emphasis added.]

Peter, 903 F.2d 935, 941.

Although the petitioners would have this court believe that the Fifth Circuit has applied its own, unsound interpretation of the LHWCA, it is obvious the Third Circuit agrees with that analysis. Again, petitioners point to no other circuit which conflicts with the Fifth or Third Circuit on this issue.

Lastly, petitioners are not the first to ask this court to review the Fifth Circuit's decision that the borrowed servant doctrine survived the 1984 amendments. In **Alexander v. Chevron, U.S.A.**, 806 F.2d 526 (5th Cir. 1986), cert. den., 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed. 2d 735 (1987), the Fifth Circuit affirmed a district court decision in which the lower court

held that the plaintiff was a borrowed employee of the general contractor - Chevron. Further, the court declined to reconsider its rejection of the argument that the 1984 amendments to Section 905(a) of the LHWCA precluded a finding that a subcontractor's employee is the borrowed employee of a contractor. As in this case, the plaintiff petitioned this court to review that decision. This court denied the petition. **Alexander**, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed. 2d 735 (1987). See also, **Capps v. N.L. Baroid - NL Industries, Inc.**, 784 F.2d 615 (5th Cir. 1986), cert. den., 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed. 2d 83 (1986). Thus, this court has already determined that petitioners' argument is not worthy of review.

CONCLUSION

The "borrowed servant" doctrine is both beneficial and detrimental to employers such as ARCO. On one hand, ARCO may, when the facts dictate, receive tort immunity for subcontractor employees' suits; however, with that tort immunity, ARCO is clearly obligated to pay all compensation and medicals should the actual employer default on that obligation. Further, once the facts demonstrate that a principal such as ARCO is controlling the activities of an individual worker, ARCO faces third party liability for any negligence under the doctrine of respondent superior. Pretermitting the fact that the Fifth Circuit correctly decided the "borrowed servant" issue, petitioners cite no reason that this court should grant petitioners' application for a writ of certiorari. There are no conflicts among the circuits. In fact, the circuits are wholly consistent on this issue. Further, this court has had the opportunity to review this specific issue and has declined to do so. **Alexander** and **Capps**. Petitioners' argument that this is an important matter of federal law which has not been settled by this court has no merit. Thus, there are no grounds on which this court should issue a writ of certiorari to review the Fifth Circuit's decision.

For the above reasons, it is respectfully requested the petitioners' application for a **Writ of Certiorari** be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael M. Christovich, a member of the Bar of the United States Supreme Court, do certify that service of three (3) copies of this petition for writ of certiorari was made by mail on Petitioners, Joseph Berghman and Joetta Berghman, through their counsel of record, Alonzo T. Stanga, III, 3117 22nd Street, Suite 6, Metairie, Louisiana 70002, McDermott, Inc. through its counsel of record, Andre J. Mouledoux, at the offices of Hebert, Mouledoux & Bland, 1650 Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130 and upon Houma Industries, Inc., through its counsel of record J. Mark Graham, at the offices of Henderson, Hanemann & Morris, 300 Lafayette Street, Houma, Louisiana 70360, all in accordance with the Rule 29, paragraph 3 of the rules of the Supreme Court of the United States this 23rd day of December, 1992.

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